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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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In the Matter of:

MATSU CORP. d/b/a Matsu Sushi,  
  
Respondent,

Case No.: 01-CA-214272

And

FLUSHING WORKERS CENTER

Charging Party.  
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**RESPONDENT'S REPLY BREIF IN FURTHER SUPPORT OF EXCEPTIONS**

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## **PRELIMINARY STATEMENT**

General Counsel and the ALJ's assertion that that Ding and Jiang testified credibly is flawed. General Counsel simply stated that it was right and Respondent was wrong without referencing any evidence to back up its claim or refute Respondent's specific examples regarding material facts. The ALJ gave improper weight to the testimony of Ding and Jiang. A clear preponderance of all the relevant evidence shows that Ding and Jiang were not credible witnesses. They were nonresponsive to cross-examination and their testimony was contradicted by other statements they made, common sense, and the testimony of other credible witnesses.

General Counsel and the ALJ's assertion that Ding and Jiang were engaged in protected concerted activity is flawed. There is compelling evidence that Ding and Jiang used allegations of unsafe working conditions as a pretext to stop work. Their true motivation for not working was to gain leverage in an investment dispute between them and the company. It is undisputed that some of the investment failed because of the closure of the second restaurant they investment. It is completely baseless and improper for General Counsel to argue that the investments were lost to the owners and the loss of investments somehow showed that the workers were exploited. General Counsel mischaracterizes and attempts to obfuscate Respondent's very clear argument that the work stoppage was motivated by an investment dispute, and not employment conditions.

General Counsel and the ALJ's assertion that Ding and Jiang were discharged by Matsu Corp. is flawed. The evidence supporting a discharge is from Ding and Jiang's testimony. However, their testimony was not credible and should be discounted. Meanwhile Lin and Cheng provided credible testimony that Ding and Jiang walked off the job and never contacted the

employer about returning. The ALJ and General Counsel also lean heavily on affidavits from Lin and Cheng stating that Ding and Jiang were fired. Lin and Cheng are not familiar with the English language and the lawyer who prepared the affidavits did not take adequate steps to ensure that Lin and Cheng understood what they were signing. The affidavits were not properly prepared and so their probative value is negligible. They should be disregarded.

## **ARGUMENT**

### **I. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING DING AND JIANG CREDIBLE**

Liguo Ding (“Ding”) and Jianming Jiang (“Jiang”, collectively “the employees”) did not testify credibly. The employees’ testimony was inaccurate and inconsistent. The Board’s established policy in making a credibility determination is to consider multiple factors, including testimonial records and exhibits, the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton MFG. Co.*, 369 U.S. 404, 408 (1962). The Board considers weight of the respective evidence, established or admitted facts, and inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* Sub nom. 56 Fed. Appx. 516 (D.C. Cir. 2003). The Act commits to the Board itself, not to the Board’s Trial Examiners, the power and responsibility of determining the facts. 29 U.S.C. § 160(c). Accordingly, the Board’s findings of facts are based upon a *de novo* review of the entire record. The Board is not bound by the Trial Examiner’s findings. Typically, the Board will overturn the Trial Examiner’s resolutions as to credibility in cases where the clear preponderance of all the relevant evidence

convinces it that the Trial Examiner's resolution was incorrect. *Standard Dry Wall Products, Inc.* 91 NLRB No. 103 (1950).

General Counsel argues that there is no basis for overruling the ALJ's credibility determination, but a clear preponderance of all of the relevant evidence shows the ALJ's credibility determination was incorrect. Ding and Jiang were nonresponsive under cross examination. The testimony they offered on their hours worked was often inaccurate and internally inconsistent, in addition to being inconsistent with the testimony of other witnesses.

A. Ding and Jiang were Generally Nonresponsive Under Cross Examination, and this has direct bearing on the credibility of their testimony

The Respondent's Brief in Support of Exceptions lays out numerous instances where Ding and Jiang were nonresponsive and evasive under cross examination. General Counsel responds that this is "simply untrue" but does not engage with any of the examples or analysis from Respondent's Brief. General Counsel merely retorts that "a reading of the record shows both employees answered every question they were asked and were cooperative on cross-examination." In other words, General Counsel simply repeats its conclusion, says the other side is wrong, and offers no proof from the record to back up its own assertions or refute the other side's assertions. Such argumentation is inadequate and unpersuasive. The Board should not rely on General Counsel's assertions that Ding and Jiang were responsive. A reading of Respondent's Brief, backed by the record, shows that Ding and Jiang were unresponsive under cross-examination, and this should be viewed adversely when considering their credibility.

B. Ding and Jiang offered inaccurate and inconsistent testimony, and this has direct bearing on their credibility

The Respondent's Brief in Support of Exceptions lays out numerous instances where Ding and Jiang offer inaccurate testimony and testimony that is contradicted internally and by the testimony of other witnesses. These inaccuracies and inconsistencies especially arise when the employees are discussing their hours worked. General Counsel claims that "While there are different ways to calculate what hours should be treated as "on the clock," ultimately, this has no bearing on finding the violations. ... Fixating on the specifics of the employees' schedules is not warranted and does not relate to the merit of the violations." GC Answering Brief 3-4. General Counsel later states that the testimony about the hours worked has nothing to do with credibility. *Id.* This is not true and General Counsel is mischaracterizing Respondent's arguments. The highlighting of inaccuracies and inconsistencies in Ding and Jiang's testimony was not meant to prove the point asserted in the statements; it was meant to ascertain the credibility of the witnesses. This was conveyed quite plainly in Respondent's Exceptions and Brief in Support of Exceptions. General Counsel's claims that the inconsistencies have nothing to do with the elements of the law misses the point entirely.

The ALJ made a similar mistake in his decision and order. He stated "[T]he actual hours work does not diminish the merit of [Ding and Jiang's] claim and is irrelevant in assessing a violation of the Act by the Respondent." ALJ Decision 7 n.10. Respondent never argued that the hours worked was an element of the charged violation or a question of fact with direct bearing on the law. Rather, Ding and Jiang's inaccurate and inconsistent testimonies are relevant as to their credibility as witnesses and should be factored into any credibility determination of

their testimony because it was the alleged harsh hours that caused the alleged health concern. It is undisputed that even if the hours worked was not an element of the charged violations. It is clearly a material fact and relevant fact that the ALJ should have taken into full consideration.

## **II. DING AND JIANG DID NOT ENGAGE IN PROTECTED CONCERTED ACTIVITY**

Ding and Jiang did not engage in protected concerted activity when they refused to work the big order shift. The National Labor Relations Act forbids an employer from interfering with an employee's right to engage in concerted activities for the purpose of mutual aid or protection. 29 U.S.C. § 158. Mutual aid or protection generally means efforts to improve the terms and conditions of employment. *See Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 564-70 (1978). Respondents showed that Ding and Jiang's refusal to work was motivated by an investment dispute, not employment conditions.

Ding and Jiang both worked at the restaurant for over thirteen years. Tr. 55:12, 83:13. In addition, they each owned 5% of Matsu Corp. Tr. 105:8-14. Throughout their years of employment, Ding and Jiang worked on "big orders." They never complained about their health or expressed any safety concerns over working big orders. Tr. 41:4-21. They performed their jobs adequately and never refused to work a big order shift. Tr. 67:20-24; 108:8-11. They received dividends through their ownership of Matsu Corp. and were content to reap the rewards from a profitable business when times were good. Tr. 105:11-106:12. Then Matsu invested in Matsuri restaurant (Matsuri). Matsuri performed poorly and closed in September 2017. ALJ Decision 6 n.9; Tr. 18:13-14. The closing of the Restaurant naturally resulted in lost shareholder value and a decrease in profitability for all shareholders of Matsu Corp. Ding and Jiang were

very upset about the failed investment and a dispute arose between them and the majority shareholders of Matsu Corp. over recoupment of their investments. Tr. 36:2-40:3, 105-109. It was also around this time that Ding and Jiang claim to have started having health problems related to working the big orders. Tr: 58. This is not a coincidence. The employee's alleged health and safety concerns were simply a pretext to cover the true reason for their resentment with their employer, the investment dispute.

General Counsel chooses to ignore compelling evidence showing that the health and safety objections were a pretext for the underlying investment dispute and instead misrepresents Respondent's contentions in his Opposing Brief. General Counsel states "In Respondent's view, because the employees had a separate financial dispute with Respondent's owners, their otherwise protected protest of the 36-hour shift should somehow be rendered unprotected. Notably, Respondent provides no caselaw in support of this proposition." The view General Counsel attributes to Respondent is a complete mischaracterization of Respondent's arguments. Respondent has repeatedly argued that Ding and Jiang's refusal to work was in response to an investment dispute, and not related to any purported health conditions. Testimony and evidence from all parties contradict Ding and Jiang's claim that they their refusal to work was motivated by health concerns. Their complaint about working the big order was merely cover for a work stoppage that was meant to put pressure on their employer for a resolution of the investment dispute in their favor. This argument was unpacked and substantiated in detail at the hearing, in Respondent's Post Hearing Brief, and in Respondents Brief in Support of Exceptions; yet General Counsel and the ALJ ignore it completely and erroneously downplay the impact of the investment dispute.

### **III. MATSU CORP. DID NOT DISCHARGE DING AND JIANG**

Matsu Corp. did not discharge Ding and Jiang. Ding and Jiang testified that they were not allowed to return to work, but that is contradicted by testimony from Lin and Cheng. Lin and Cheng testified that Ding and Jiang never asked to return to work after December 8, 2017. Tr. 120:18-25; ALJ Decision 9:24-29. The Administrative Law Judge and General Counsel solely relied on testimony from Ding and Jiang in determining that they were fired. However, this testimony is self-serving. Respondents have exposed serious credibility issues with Ding and Jiang's testimony. Meanwhile, Lin and Cheng provided straightforward and credible testimony that Ding and Jiang left work and never returned.

In addition, the ALJ relied on affidavits from Lin and Cheng that stated that Ding and Jiang were fired. (ALJ Decision 9:35-40). Lin and Cheng are not familiar with the English language. Their previous attorney prepared the affidavits, but did not provide a translator, read the statements back to them in Chinese, or take any other steps to ensure that Lin and Cheng fully understood what they were signing. Yet in General Counsel's Opposition Brief, he makes the same mistake the administrative law judge did, which is to focus on Respondent's previous lawyer and his obligation to ensure the accuracy of the statements, rather than evaluating the statements for their probative value. General Counsel is ready to acknowledge a language barrier in support of Ding and Jiang, Opposing Brief 4, but here, where it would work against him, he is dismissive of it. The ALJ acknowledged a language barrier, yet did not let that factor into the probative value of the affidavits. Tr. n.12. The affidavits should be ignored because the manner in which they were prepared makes their allegations unreliable.

## CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Board reject the ALJ's Decision and Order and rule that Respondent did not terminate Ding and Jiang in violation of 29 U.S.C. § 158 or remind the matter for a new hearing so that additional evidence can be presented regarding the investment dispute.

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